

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
BRIEF**





# 76-4212

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

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NO. 76-4212

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THE CONNECTICUT LIGHT AND POWER COMPANY

*Petitioner*

*v.*

FEDERAL POWER COMMISSION

*Respondent*

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ON PETITION FOR REVIEW FROM THE  
FEDERAL POWER COMMISSION

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### BRIEF OF THE PETITIONER THE CONNECTICUT LIGHT AND POWER COMPANY

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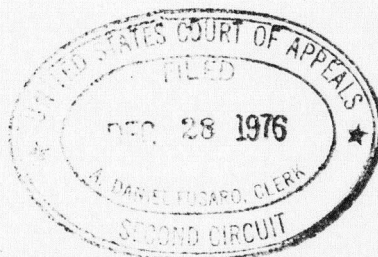
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**PRELIMINARY STATEMENT PURSUANT TO  
SECTION 28, RULES OF THE COURT OF  
APPEALS FOR THE SECOND CIRCUIT**

The decision to be reviewed by the Court was rendered by the Federal Power Commission on May 24, 1976 and is not reported. It is reproduced in the Joint Appendix (pp. 77-110).

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### STATEMENT OF THE ISSUES

- I. Is there substantial evidence in the record to establish that the Stevenson Project has undergone construction of "a dam or other project works" after August 26, 1935, a prerequisite to Federal Power Commission licensing jurisdiction under the 1935 amendment to Section 23(b) of the Federal Power Act, 16 U.S.C. § 817?
- II. Does the mere interconnection of the Shepaug Project and the Stevenson Project with an interstate electrical power transmission network establish by substantial evidence that the construction of such projects would affect the interests of interstate or foreign commerce, a prerequisite to Federal Power Commission licensing jurisdiction under the 1935 amendment to Section 23(b) of the Federal Power Act, 16 U.S.C. § 817?
- III. Do the 1952 findings and order of the Federal Power Commission, necessarily determining that the Housatonic River was not "navigable waters" within the meaning of Sections 3(8) and 23(b) of the Federal Power Act, 16 U.S.C. §§ 796 and 817, bar relitigation of the non-navigability of the Housatonic River by operation of res judicata and collateral estoppel, and preclude the Federal Power Commission from now determining that it has jurisdiction over the projects under consideration on the basis that they are in navigable waters?
- IV. If the Federal Power Commission is not precluded by its 1952 findings and order from asserting jurisdiction in this proceeding, does the extraordinarily sparse material in the record constitute substantial evidence to support the Commission's finding that the Housatonic River is navigable waters of the United States at the site of each project under consideration so as to constitute a basis for licensing jurisdiction?

## STATEMENT OF THE CASE

This proceeding, brought to the Court on a petition for review of the findings and order of the Federal Power Commission (hereinafter the "Commission"), involves the claimed jurisdiction of the Commission under the Federal Power Act, 16 U.S.C. 791a, *et seq.*, 49 Stat. 863 (hereinafter the "Act"), to license four hydroelectric projects of The Connecticut Light and Power Company (hereinafter "CL&P") located on the Housatonic River in Connecticut.

At the insistence of the Commission, CL&P applied under protest for licenses for its Bulls Bridge Project (No. 2604), Rocky River Project (No. 2632) and Shepaug Project (No. 2576) in 1966. (Joint Appendix, pp. 12-17 (hereinafter "App.")). In 1967 CL&P applied under protest for a license for its Stevenson Project (No. 2646). (App. 18-19).

On December 27, 1973 CL&P filed notices of withdrawal of these applications on the ground that the Commission lacked licensing jurisdiction over the projects. (App. 20-44). Pursuant to the Commission's Order issued June 25, 1974 (App. 53) a joint proceeding on the question of jurisdiction was held. After the conclusion of hearings on this issue, the Initial Decision of the presiding administrative law judge found all four projects to be subject to the Commission's licensing jurisdiction. (App. 77). The Commission adopted this decision (hereinafter cited as "Dec.") by its order issued May 24, 1976 (App. 111). On June 23, 1976 CL&P filed an application for rehearing of this order (App. 113), which the Commission denied. (App. 125).

Thereafter, pursuant to Section 313b of the Act, CL&P duly filed a petition for review in this Court. (App. 923).

## STATEMENT OF FACTS

This proceeding involves claimed Commission licensing jurisdiction over four hydroelectric projects located in Connecticut on the Housatonic River, which are owned and operated by CL&P.

The Housatonic River has its source in western Massachusetts and enters Connecticut at Mile 83.\* From the Massachusetts-Connecticut state line, the river flows southerly through Connecticut to Bulls Bridge (Mile 52.9) and thence southeasterly to the tidewater at the twin cities of Shelton and Derby at Mile 13.5. From Shelton and Derby, the tidal reach of the river extends southerly to its mouth, where the Housatonic River enters Long Island Sound at Stratford, Connecticut, approximately four miles east of the City of Bridgeport. (Exh. 5, 13, App. 131, 146).

The four projects in question are Bulls Bridge, located 52.9 miles upstream from the river mouth; Rocky River, 44.3 miles upstream; Shepaug, 30 miles upstream; and Stevenson, 19.3 miles upstream. (Exh. 5, 13, App. 131, 146). Bulls Bridge was built in 1903 and acquired by CL&P in 1917. Stevenson was built in 1919, Rocky River in 1929 and Shepaug in 1955. (Exh. H in Item by Reference G-3, App. 348).

Although work, such as maintenance and repairs, has been performed on each of these projects since completion, the only work pertinent to this proceeding was the addition of a fourth generating unit at the Stevenson Project. This addition was completed in 1936. (Tr. 95-96, App. 405-06).

On June 2, 1952, Electric Power, Inc., a predecessor in interest of CL&P, filed under Section 23(b) of the Act a declaration of intention to construct the Shepaug Project. (Tr. 720, App. 829). The Commission subsequently issued findings and an order, reported at 11 F.P.C. 1548 (App. 922), which found an absence of licensing jurisdiction over the Shepaug Project. At that time, the Commission also

\* The expression "Mile ....." means that a particular point along the Housatonic River is ..... miles above the mouth of the river at Long Island Sound, according to the data shown in the profile of the river which is Exh. H in Item by Reference G-3 (App. 348).



issued a public release explaining that its decision removed any requirement for a license to construct and operate the Shepaug Project. (Exh. S-3 in Item by Reference G-3, App. 352).

There is no evidence that any electrical power from outside of Connecticut reaches any of the projects. (Dec., p. 26, n.1, App. 102). There is no finding that any power from these projects flows outside of Connecticut. (Dec., pp. 27-31, App. 103-07). There is no dispute that some of the power generated by other generating units of the CL&P system does flow across state lines. (Tr. 79, 183, App. 389, 491).

Since this proceeding involves a factual review of the record below to determine whether the Commission's findings and order are based on substantial evidence, further evidence introduced in the course of the Commission's hearing is set forth at pertinent points in CL&P's Argument.

### SUMMARY OF ARGUMENT

Commission jurisdiction to license CL&P's four projects can arise only under the alternative grounds of Section 23(b) of the Act: A) the projects affect interstate commerce; or B) the projects are in navigable waters.

The "affecting interstate commerce" basis for licensing jurisdiction is limited to projects undergoing construction of "a dam or other project works" after August 26, 1935. There is no dispute that the Bulls Bridge and Rocky River Projects are "pre-1935" projects and that Shepaug is a "post-1935" project. There is a dispute as to whether the Stevenson Project is a "pre-1935" project. Nevertheless, it is CL&P's contention that none of the projects affects interstate commerce, regardless of whether they could be found to be constructed after 1935.

The "navigable waters" basis for jurisdiction is potentially applicable to all four projects. It is CL&P's initial contention that the Commission is estopped from finding the Housatonic River to be navigable waters of the United States at the projects. Even if the Commission could properly relitigate this issue, the record does not contain substantial evidence to sustain the Commission's finding that the Housatonic River is navigable waters at these locations.

Therefore, the Commission lacks jurisdiction to license these four projects under Section 23(b) of the Act.

## ARGUMENT

### I. THE COMMISSION HAS NO JURISDICTION TO LICENSE THE FOUR PROJECTS UNDER THE AUGUST 26, 1935 AMENDMENT TO THE FEDERAL POWER ACT.

#### A. No Construction Of A "Dam Or Other Project Works" Occurred On The Bulls Bridge, Rocky River Or Stevenson Projects After 1935, Although Such Construction Is A Prerequisite To Commission Jurisdiction Under The 1935 Amendment To The Act.

One of the two bases for Commission jurisdiction to license hydroelectric projects is that construction of a dam or project works has occurred after August 26, 1935, the effective date of the 1935 amendment to Section 23(b) of the Act, and such construction affects interstate or foreign commerce. *See, F.P.C. v. Union Electric Co.*, 381 U. S. 90, at 106-07, n.25 (1965) (hereinafter "*Taum Sauk*"). The 1935 amendment to Section 23(b) provides that:

Any person, association, corporation, State, or municipality intending to *construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters*, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause *immediate* investigation of such proposed construction to be made, *and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction* such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. [Emphasis added.]

16 U.S.C. § 817.

The 1935 amendment to the Act applies only to projects where construction of "a dam or other project works" has occurred after passage of the amendment. *Farmington*



*River Power Co. v. F.P.C.*, 455 F.2d 86 (2d Cir. 1972). The Commission determined that no construction of a dam or other project works at the Bulls Bridge and Rocky River Projects occurred after August 26, 1935. (Dec., p. 30, App. 106). Therefore, the Commission has jurisdiction over the projects at Bulls Bridge and Rocky River only if the Housatonic River is "navigable waters" at these projects. This issue is discussed below. (*Infra* at 13-42.)

CL&P does not dispute that the Shepaug Project was constructed after 1935. Therefore, the Commission would have jurisdiction over that project under the 1935 amendment if its construction would affect interstate or foreign commerce.

CL&P disputes the finding of the Commission that the Stevenson Project underwent construction of project works after August 26, 1935. The Commission's Staff and the intervenors failed to carry their burden of proving by substantial evidence this prerequisite to jurisdiction under the 1935 amendment. Hence, the finding and order on this point must be reversed. See, Section 313 of the Act; *F.P.C. v. Florida Power & Light Co.*, 404 U.S. 453, 464, 469 (1972).

The record does not contain substantial evidence that work at the Stevenson Project subsequent to 1935 constituted construction of "other project works," rather than work in the nature of maintenance, repair, replacement, or modest additions to existing structures. See, *Public Service Company of New Hampshire*, 27 F.P.C. 830 (1962), *modified*, 31 F.P.C. 417 (1964). The Stevenson Project was constructed between 1917 and 1920 with three 7,500 kilowatt units and included necessary facilities for installation of a fourth unit in the future without structural modifications of significance. (Tr. 95, App. 405). In June 1930, CL&P instructed an independent engineering firm to determine the proper size of the fourth unit. (Tr. 95, 295, App. 405, 519). In 1935, CL&P authorized installation of the fourth unit and placed purchase orders therefor. The fourth unit was put into regular service in 1936 and increased the generating capacity of the Project by about a third. The installa-

tion required no substantial alterations to the dam, intake facilities, powerhouse or tailrace and was regarded by CL&P and its consulting engineers as a project planned in 1917 and commenced in 1930. (Tr. 95-96, App. 405-06).

Similar construction of a nonsubstantial nature has been held not to subject hydroelectric projects to the Commission's licensing jurisdiction under the 1935 amendment. For example, in *Public Service Company of New Hampshire, supra*, replacement of a timber-cribbed dam was not "construct[ion of] . . . project works." In accord is *Western Massachusetts Electric Co.*, 32 F.P.C. 129, *modified*, 32 F.P.C. 733 (1964), involving modification of a dam to increase its stability and to improve its hydraulic characteristics.

The Commission's Decision (p. 27, App. 103) admits that a mere increase in project generating capacity is not substantial evidence of construction of project works. The re-wiring of the Rocky River Project after August 26, 1935, which increased generating capacity by over 25%, was characterized as a "substantial increase in generating capacity", but was found not to be construction of "project works". (Dec., p. 27, App. 103).

Significantly, there is nothing in the record to support the finding of the Commission that the increase in project generating capacity at Stevenson was "achieved by substantial foundation work and installations" constituting construction of project works.

The insubstantial nature of the work at the Stevenson Project sharply contrasts with that in decisions in which "construct[ion of] . . . project works" has been found. *See, Bangor Hydro-Electric Co.*, 33 F.P.C. 278 (1965), *aff'd*, 355 F.2d 13 (1st Cir. 1966) (construction of a second powerhouse and installation of generating units therein); *Montana Power Co.*, 22 F.P.C. 502 (1959), *aff'd*, 298 F.2d 335 (D.C. Cir. 1962) (addition of an extension to a powerhouse, construction of a new intake and tunnel, and addition of a \$4,860,339 generating unit of 60,000 kilowatts).



The Commission's finding that the Stevenson Project underwent construction of project works after August 26, 1935 is not in accord with precedent and is not supported by substantial evidence in the record.

**B. Neither The Stevenson Project Nor The Shepaug Project Affects Interstate Or Foreign Commerce, Although This Is A Prerequisite To Commission Jurisdiction Under The 1935 Amendment To The Act.**

Even if the Court were somehow to find that the record contains substantial evidence of construction of project works at the Stevenson Project after 1935, the Commission has jurisdiction over the Stevenson Project pursuant to the 1935 amendment to Section 23(b) of the Act only if "the interests of interstate or foreign commerce would be affected by such . . . construction. . . ." Similarly, the Commission has jurisdiction based on this part of Section 23(b) to license the Shepaug Project, constructed after 1935, only if construction of that project affects the interests of interstate or foreign commerce.

The Commission has determined that discharge of water by the Stevenson and Shepaug projects does not affect "the interests of interstate or foreign commerce." (Dec., p. 27, App. 103). Therefore, interstate or foreign commerce could be affected by construction of these two projects, if at all, only indirectly through their generation of electric power after such construction.

The Commission's Decision (p. 29, App. 105), posed this issue in the following words:

CL&P is part of an interconnected interstate system, and the question is whether by reason of this, *without more*, the [post-1935] Projects' generation of electric energy affects the interests of interstate commerce. [Emphasis added.]

The Commission answered this question in the affirmative.

No case and no other Commission proceeding has ever gone so far in extending Commission jurisdiction. This extraordinary decision is erroneous on at least three separate grounds: (1) mere electrical interconnection of a

hydroelectric project into an interstate transmission network or grid does not constitute substantial evidence of an effect on interstate commerce; (2) even if electromagnetic interconnection raised a presumption of such an effect, the presumption would be clearly rebutted by the evidence in this proceeding; and (3) even conceding for purposes of argument an effect on interstate commerce by the Stevenson and Shepaug projects, the effect would be *de minimis*, and hence, insufficient to support Commission licensing authority under the Act.

The Decision on this issue flies in the face of an explicit limitation on Commission jurisdiction, expressed in *Jersey Central Power and Light Co. v. F.P.C.*, 319 U.S. 61, 72 (1943), which considered Commission jurisdiction under Section 201 of the Act involving facilities for transmission in interstate commerce. The Supreme Court stated there that "mere connection determines nothing." The same limitation applies under the 1935 amendment to Section 23(b) of the Act. A presumption of an effect on interstate commerce from mere interconnection is totally without support in the Act and would shift the burden of proving such effect from the Commission, contrary to Section 313 of the Act. Therefore, it is not surprising that no court has ever held the existence of an interconnected interstate transmission network, *without more*, establishes that every hydroelectric project connected with such a network affects the interests of interstate commerce.

In *Taum Sauk*, *supra*, the Supreme Court analyzed the relationship between the jurisdiction of the Commission pursuant to Section 23(b) of the Act and electrical generation. It held that a post-1935 hydroelectric project transmitting power interstate, even if located on a non-navigable portion of a river, is subject to Commission jurisdiction under Section 23(b) of the Act. However, the Court made repeated reference to the fact that energy from the Taum Sauk project was transmitted interstate and thereby affected interstate commerce. The concluding paragraph of *Taum Sauk* states in pertinent part that:

[T]he Commission's jurisdiction here rests solely on the interstate transmission of energy. . . .

381 U.S. 90, at 109.

In a hypothetical example, identical to the situation of CL&P's four projects, the Supreme Court concluded that jurisdiction was lacking because all sales from such a project were local, without transmission into electrical "pools" or facilities from which interstate sales might occur. The Supreme Court, perhaps with facts identical to CL&P's in mind, put the matter this way:

Respondent notes that if the use of water resources is at the heart of the matter, then it cannot be explained why the Act differentiates between two precisely similar hydroelectric plants on a nonnavigable stream subject to federal jurisdiction solely because one transmits energy in interstate commerce and the other generates for local use. We fail to perceive the difficulty. *The project located on a nonnavigable stream, without any effect on navigability and water commerce and without any interstate sales, may well have no effect on commerce among the States and thus be beyond the power of Congress under the Commerce Clause.* [Emphasis added.]

381 U.S. 90, at 110, n.29.

In other words, the Supreme Court expressly excluded from Commission jurisdiction under the 1935 amendment to Section 23(b) of the Act *projects without interstate sales*. The Commission attempts to distinguish this limitation on its authority by blandly stating that "system" should be substituted for the word "project". (Dec., p. 29, App. 105). Such torturing of the language of the Supreme Court should not be countenanced by this Court.

The Commission's interpretation of its authority is also contrary to the decision of the Court of Appeals for the Fourth Circuit in *Nantahala Power & Light Co. v. F.P.C.*, 384 F.2d 200, 202, n.1 (4th Cir. 1967). *Nantahala* interpreted *Taum Sauk* to require interstate transmission of electrical energy from the hydroelectric *project* involved, not just the system with which such project is interconnected, to support Commission jurisdiction.

This limitation on Commission authority under the Act



is dictated by the express language of Section 23(b), which requires that the interests of interstate commerce must be affected by the "construction" of the "dam or other project works" in question, not by the system with which they are interconnected.

In short, the Commission has clearly interpreted the law erroneously in finding that a hydroelectric project's interconnection with an interstate grid, *without more*, makes the project subject to the Commission's licensing jurisdiction.

Even if mere connection of a hydroelectric project with an interstate grid raised a presumption that construction would affect interstate commerce, such a presumption would have been rebutted in this proceeding. CL&P's expert witness, Hale Lull, testified that none of the power generated by the Stevenson and Shepaug projects flowed, or could flow, out of the local load area. (Tr. 79-81, 185-86, Exh. 1-4, App. 389-91, 493-94, 127-30). Therefore, except in a *hypothetical* momentary emergency (Tr. 185-86, 784, App. 493-94, 899), power from these projects would never commingle with energy which could eventually flow across state lines.\* Since Section 23(b) of the Act requires an actual effect, not a mere possibility, such a hypothetical situation is irrelevant to determining Commission jurisdiction and cannot satisfy the Commission's burden of proving by substantial evidence that the construction of such projects affects the interests of interstate or foreign commerce.

Even assuming for the sake of argument that the Stevenson and Shepaug projects affect interstate commerce by their mere connection with an interstate grid system, Commission jurisdiction would still not exist because there is no substantial evidence in the record showing their "ef-

\* Contrast the decisions under Section 201(b) of the Act in which substantial evidence submitted by the Commission Staff did establish that such commingling occurred and that interstate transmission of electricity in fact occurred. *Jersey Central Power & Light Co. v. F.P.C.*, 319 U.S. 61 (1943); *F.P.C. v. Southern California Edison Co.*, 376 U.S. 205 (1964); *Arkansas Power & Light Co. v. F.P.C.*, 368 F.2d 376 (8th Cir. 1966); *Indiana & Michigan Electric Co. v. F.P.C.*, 365 F.2d 180 (7th Cir.), *cert. denied*, 385 U.S. 972 (1966); *Public Service Co. of Indiana, Inc. v. F.P.C.*, 375 F.2d 100 (7th Cir.), *cert. denied*, 387 U.S. 931 (1967); *Cincinnati Gas & Electric Co. v. F.P.C.*, 376 F.2d 506 (6th Cir.), *cert. denied*, 389 U.S. 842 (1967); *F.P.C. v. Florida Power & Light Co.*, 404 U.S. 453 (1972).

fect" on interstate commerce to be more than de minimis. In *Taum Sauk*, *supra* at 101, 109, the Supreme Court required that jurisdiction under Section 23(b) be based on an effect that is "significant" and that "commerce interests are vitally involved." See, *Jersey Central Power & Light Co. v. F.P.C.*, 319 U.S. 61, 72 (1943); *Connecticut Light & Power Co. v. F.P.C.*, 324 U.S. 515, 531 (1945); *F.P.C. v. Florida Power & Light Co.*, 404 U.S. 453, 473 (1972) (Douglas, J., dissenting). In its Decision the Commission itself recognized the applicability of this de minimis rule in deciding the extent of its jurisdiction when it noted that even though the emptying of a barrel of water would have some effect on the Housatonic River, "the interests of interstate or foreign commerce" were not and would not be affected thereby. (Dec., p. 27, App. 103).

The output of *all* of the projects involved in this proceeding is only 115.7 megawatts, far below the minimum load for the local Connecticut area served by them, and insignificant in relation to the total load of the CL&P system. (Tr. 79, App. 389). The massive power blackouts, referred to by the Commission (Dec., p. 30, App. 106) as "effects," are irrelevant in this proceeding. Uncontroverted evidence established that the power generated by the Shepaug and Stevenson projects could not possibly satisfy system loads so as to prevent a blackout. (Tr. 185-86, App. 493-94). Nor could loss of such a minor part of CL&P's system alone cause such a blackout.

For these reasons, the Commission does not have authority over any of the projects under consideration pursuant to the 1935 amendment to Section 23(b) of the Act.

**II. BY OPERATION OF THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL THE HOUSATONIC RIVER MUST BE FOUND NOT TO BE "NAVIGABLE WATERS" AT THE FOUR PROJECTS, WHICH ARE THEREFORE NOT SUBJECT TO THE COMMISSION'S JURISDICTION UNDER THE FEDERAL POWER ACT.**

The other possible basis of Commission licensing jurisdiction over projects such as CL&P's is that the Housa-

tonic River is "navigable waters," within the meaning of the Act. Commission jurisdiction on this basis does not depend on when the projects were constructed.

If the Commission's findings and order in *Electric Power, Inc.*, 11 F.P.C. 1548 (1952) (App. 922), operate as res judicata with respect to the non-navigability of the Housatonic River at the Shepaug Project and as a collateral estoppel with respect to the non-navigability of the river at the other three projects, this Court will not need to explore the record in depth to determine whether the Commission had before it substantial evidence to support a finding of navigability. Since CL&P does not believe it necessary for this Court to reach the factual question of navigability, discussion of navigability has been placed in Section III of its Argument.

Professor Moore in his treatise on federal practice describes res judicata and collateral estoppel in the following terms:

The term res judicata is often used to denote two things in respect to the effect of a valid, final judgment: (1) that such a judgment, when rendered on the merits, is an absolute bar to a subsequent action, between the same parties or those in privity with them, upon the same claim or demand; and (2) that such a judgment constitutes an estoppel, between the same parties or those in privity with them, as to matters that were necessarily litigated and determined although the claim or demand in the subsequent action is different.

1B MOORE'S FEDERAL PRACTICE ¶ 0.405[1], at 621 (2d Ed. 1974).

This Court has held that these doctrines are "no mere technicality but a reasonable measure calculated to save individuals and courts from the waste and burden of relitigating old issues." *Tillman v. National City Bank of New York*, 118 F.2d 631, 634 (2d Cir.), cert. denied, 314 U.S. 650 (1941). Indeed, the Supreme Court has stated that the rule is "demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of



judicial determination." *Southern Pacific R.R. Co. v. United States*, 168 U.S. 1, 49 (1897).

The Commission's 1952 decision is res judicata as to the matters there determined and operates as a collateral estoppel with the same force as a judicial decision. As the Supreme Court made clear in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966):

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

This Court recognized the res judicata effect of an administrative agency determination in *Taylor v. New York City Transit Authority*, 433 F.2d 665 (2d Cir. 1970). See also, *City of Hastings, Neb. v. Kansas-Nebraska Nat. Gas Co.*, 226 F.2d 419, 422 (8th Cir. 1955). Indeed, the Commission itself has recognized and applied this rule of repose where there was no allegation that conditions or circumstances had changed since an earlier order. *Northern Natural Gas Co.*, 95 P.U.R. (N.S.) 143 (1952); *United Gas Pipe Line Co.*, 15 P.U.R.3d 216 (1956).

The Commission concedes that the requirements for the application of res judicata and collateral estoppel are met in this proceeding by holding that its findings and order in *Electric Power, Inc.*, *supra*, are binding with respect to whether "the operation of Shepaug affects downstream navigability," a matter not in issue before this Court. (Dec., p. 32, App. 108). However, it improperly refuses to give preclusive effect to its prior finding and order on the question of navigability at the project sites.

**A. The Commission's Findings And Order In "Electrical Power, Inc." Bar Relitigation Of The Question Of Navigability At The Shepaug Project By Operation Of Res Judicata.**

*Electric Power, Inc.*, *supra*, involved the same operative facts as are involved in this proceeding with respect to the non-navigability of the Housatonic River at the Shepaug

Project. Section 23(b) of the Act, which has not been changed since the 1952 proceeding, categorically requires that a project in navigable waters be licensed. (Dec., p. 33, App. 109). When CL&P's predecessor, Electric Power, Inc., submitted the Shepaug Project to the Commission's scrutiny, the Commission was obligated under the Act to determine whether the proposed project was in navigable waters as well as whether its construction would affect interstate or foreign commerce. The Commission determined in 1952 that a license for the Shepaug Project was not required. It therefore must have found that the project was not in navigable waters. Such a finding, whether express or not, was absolutely essential to the decision.

The Commission's Decision rejects the application of res judicata first because: "It does not appear and is unlikely that this assumption [of non-navigability] was challenged by the Staff." (Dec., p. 33, App. 109). This reasoning is clearly not valid. Since both proceedings involved the same parties, issues and facts, it is immaterial whether the Staff expressly challenged the fact of non-navigability. All parties to the *Electric Power, Inc.* proceeding certainly had an opportunity to litigate the issue. See, *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U.S. 683, 691 (1895). If the Staff chose not to do so, that is merely evidence of the exercise of correct judgment.

In addition, CL&P strongly disagrees with the view that the Staff probably never considered this vital issue. There is no evidence whatsoever, either in the record of this proceeding or in the Commission's earlier proceeding, to support this assertion, which is tantamount to a declaration by the Commission that its Staff and the Commission itself were derelict in the performance of their responsibilities under the Act. Furthermore, there is positive evidence that the Staff did investigate the issue of navigability in 1952. The Staff's sole primary account of logging activities on the Housatonic River in this proceeding is a newspaper article (Exh. 33, App. 300), which was apparently found by the Staff in preparation for the 1952 proceeding. (Tr.



737, App. 846). Thus, the Commission's view of earlier Staff dereliction is not only unwarranted, but is contradicted by the only evidence on the point.

The Commission suggests, as another argument against the applicability of *res judicata*, that impediments to navigation may be removed and that a stream once found non-navigable may later be found to be navigable. (Dec., p. 34, n.1, App. 110). CL&P does not disagree with this abstract proposition. However, there is not a shred of evidence in the record to support a finding of any change in the Housatonic River after 1952 that would tend to make it navigable in comparison to its pre-1952 state. Therefore, this Commission argument has no bearing whatsoever on this proceeding.

Finally, there has been no change in applicable law since the finding and order in *Electric Power, Inc., supra*. This proceeding therefore presents an issue entirely different from that considered in *Nantahala Power & Light Co. v. F.P.C., supra*, where there was a major change in the law. No such claim can be made here.

For purposes of *res judicata*, the parties are the same. The operative facts and law are the same. Therefore, the Commission is foreclosed by its prior action from holding that the Housatonic River is "navigable waters" at the Shepaug Project.

**B. The Commission's Findings And Order In "Electrical Power, Inc." Bar Relitigation Of The Question Of Navigability At The Other Three Projects By Operation Of Collateral Estoppel.**

Just as the Commission is barred by the operation of *res judicata* from finding the Housatonic River navigable at the Shepaug Project, by operation of collateral estoppel the river cannot now be found to be navigable waters at any of the other three projects.

The evidence shows that the river's character at the other three projects is the same as at Shepaug. The Rocky River Project is located at the headwater of the Shepaug reser-

voir. The Shepaug powerhouse is at the headwater of the Stevenson reservoir. The Bulls Bridge powerhouse is only 8.8 miles upstream from the headwater of the Shepaug reservoir. (Exh. 5, 13, App. 131, 146). The river gradients at the other three projects are about the same as the gradient at the Shepaug Project, approximately 8.0 feet/mile. One notable exception is that at Bulls Bridge the river falls 70 feet in less than two miles. (Exh. 13, Exh. II to Item by Reference G-3, App. 146, 351)

The Commission has not pointed to any evidence showing the river's characteristics at the Shepaug Project to be any different from the characteristics at the other three projects. In support of its finding of navigability the Commission does not cite any evidence, the significance of which was localized to a particular project. If the evidence was insufficient to support a finding of navigability of the Housatonic River in 1952, it is equally insufficient to do so today.

The parties certainly had full and fair opportunity to litigate the issue of navigability in the 1952 proceeding. Nothing shows a failure to litigate fully and fairly. Surely the Commission could not have found a fairer forum in which to litigate the question. Moreover, when the issue arose in 1952, the other three projects were already in existence. Hence, there can be no claim of surprise by subsequent events or lack of incentive to litigate the issue. *See, Zdanok v. Glidden Company, Durkee Famous Foods Division*, 327 F.2d 944 (2d Cir. 1964). As pointed out earlier, the Commission had a statutory duty to determine and assert its jurisdiction over the hydroelectric project.

To paraphrase from *Bernhard v. Bank of America Nat. Trust & Savings Ass'n.*, 19 Cal. 2d 807, 122 P.2d 892, 895 (1942), quoted in the *Zdanok* case, *supra*, the issue of navigability of the Housatonic River was the same in the 1952 proceeding as it is in this one; there was a final order of the Commission in the prior proceeding; the Commission and its Staff were party to the prior proceeding. No reason exists to relitigate the issue of navigability now.

### **C. The Commission Lacks Jurisdiction Over Each Project Under Consideration.**

The Commission's Decision (p. 33, n.2, App. 109) concedes that the Rocky River Project and the Bulls Bridge Project are not subject to Commission jurisdiction if they are not in navigable waters. In addition, CL&P believes that the Stevenson Project is not subject to Commission jurisdiction under the 1935 amendment to Section 23(b) of the Act because no "construction" of "a dam of other project works" occurred there after 1935. (*Supra* at 7-9.) Therefore, since application of the doctrine of collateral estoppel precludes a finding that these projects are in navigable waters, the Commission is without licensing jurisdiction over them.

Furthermore, since the Shepaug Project also is not in navigable waters, it may be subject to Commission jurisdiction only under the 1935 amendment to the Act. However, the record does not contain substantial evidence that the Shepaug Project or any of the other three projects affects the interests of interstate or foreign commerce. (*Supra* at 9-13). Therefore, the Commission has no licensing jurisdiction over any of the four projects.

### **III. THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE THAT THE HOUSATONIC RIVER IS "NAVIGABLE WATERS OF THE UNITED STATES" AT EACH PROJECT UNDER CONSIDERATION.**

#### **A. Applicable Statutes and Case Law.**

Unless CL&P's contention with respect to the binding effect of the Commission's decision and order in *Electric Power, Inc.*, *supra*, is accepted, it is necessary to review the record in depth to determine whether there is substantial evidence to support the Commission's Decision that the Housatonic River is navigable waters at each project.

The first sentence of Section 23(b) of the Act provides in relevant part that:

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power,



to construct, operate or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along or in any of the navigable waters of the United States . . . except under and in accordance with the terms of a . . . license granted pursuant to this chapter.

16 U.S.C. § 817.

The term "navigable waters" is defined by Section 3(8) of the Act as:

. . . those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which . . . are used or suitable for use for the transportation of persons or property in interstate or foreign commerce.

16 U.S.C. § 796(8).

The seminal case on the legal concept of navigability is *The Daniel Ball*, 77 U.S. 557 (10 Wall. 1870), in which the Supreme Court decided that the Grand River from Grand Rapids to Lake Michigan was navigable. The *Daniel Ball* regularly traversed this portion of the river with goods and passengers. The Court set forth this classical statement:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And *they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce*, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a *continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.* [Emphasis added.]

77 U.S. at 563.

In *The Montello*, 87 U.S. (20 Wall. 1874), the Supreme Court made clear that the particular mode of commerce was not significant so long as the river was used for commerce. It stated that:

If it be capable in its natural state of being used for purposes of *commerce*, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. . . . It is not, however, as Chief Justice Shaw said, "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture." [Emphasis added.]

87 U.S. at 441-42.

In *United States v. Utah*, 283 U.S. 64 (1931) the Supreme Court indicated that non-commercial uses of the Colorado River were, under the special circumstances of that case, probative of the suitability of the river for use as a highway of continued commerce among states. There was evidence of some commercial navigation, including steam boats. However, because the river was even then in an area where very little commerce of any kind existed, the instances of actual commercial use were less than might have been expected. The Supreme Court explained the applicable tests of navigability in these terms:

The evidence of the actual use of streams, and especially of extensive and continual use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.

283 U.S. at 82.

*United States v. Utah*, *supra*, is instructive because it follows earlier cases in requiring "evidence of the actual use of streams, and especially of *extensive and continual use for commercial purposes*" [emphasis added], except in remote and sparsely settled frontier areas. This exception clearly has no application to the Housatonic River where well documented exploration and settlement began more than 300 years ago and which flows through two of the most densely settled states of the Union.

More recently, the Supreme Court again looked to the

traditional test of evidence of commercial use and upheld a Commission finding of navigability. In *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), it found evidence detailing the operation on the river of several flat-bottomed boats used to ship agricultural products. There was also evidence of use of the river by boats from 50 to 70 feet long with a carrying capacity of 10 to 12 tons. See, *United States v. Appalachian Electric Power Co.*, 23 F. Supp. 83, 93-94 (W.D. Va. 1938). The Court cited as important data the testimony of numerous eyewitnesses to this use of the river and evidence that the river could be improved. Such evidence is totally lacking in this proceeding. (Dec., p. 23, App. 99).

A leading case in which the Supreme Court held a river to be non-navigable is *Leovy v. United States*, 177 U.S. 621 (1900), where the evidence showed use of the Red Pass, an offshoot of the Mississippi River, for fishing in small yawls and for one or two cargoes of willows. The Supreme Court commented that if the trial court's jury instruction permitting a finding of navigability on such facts were correct:

... then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States.

177 U.S. at 633.

In *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899), the Supreme Court, in holding a portion of the Rio Grande non-navigable, noted that: "The mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river."

On the other hand, some cases have held that evidence of "long, regular and commercially successful use of the stream for the transportation of logs and rafts" establishes navigability where the floating of such logs is "in the course of a continuous movement from one state to another . . . ." *Wisconsin Public Service Corp. v. F.P.C.*, 147 F.2d 743, 747-48 (7th Cir.), cert. denied, 325 U.S. 880 (1945) (three billion board feet shipped down the Wisconsin River between 1835 and 1897; 3,000 men engaged in lumber industry



as early as 1857); *State of Wisconsin v. F.P.C.*, 214 F.2d 334 (7th Cir.), *cert. denied*, 348 U.S. 883 (1954) (substantial logging operations on the river over a period of 48 years, including one log drive by an operator in 1895 involving 40,000,000 board feet of pine, and continual use of the river by special logging boats, 30 to 35 feet in length).

**B. The Record Does Not Contain Substantial Evidence That The Housatonic River Has Been Used For Navigation By Boat In Interstate Or Foreign Commerce Or That It Is Suitable For Such Use.**

In its Decision the Commission relies on several items of evidence, discussed below, that are claimed to demonstrate the navigability of the Housatonic River. The events purportedly recorded by such evidence, though clearly having nothing whatever to do with commerce, are relied upon to show the "susceptibility" of the Housatonic River for commerce under the *Utah* case, *supra*. However, as that case makes clear, proof of susceptibility to use as a highway of commerce by evidence of non-commercial use is permissible only "where conditions of exploration and settlement explain the infrequency or limited nature of [continued use for commercial purposes] . . . ." *United States v. Utah*, *supra* at 82. As noted, such conditions do not apply with regard to the Housatonic River.

**1. Yale Crew**

Among the most clearly irrelevant items of evidence of navigability relied upon by the Commission (Dec., p. 8, App. 84), is the use of an area of the Housatonic River by the Yale University crew. (Tr. 508, App. 676). The Decision fails to state that the portion used by the crew is below Otter Rock at Mile 18.5. (Tr. 508, App. 676) Otter Rock is downstream from all four of CL&P's projects (Exh. 5, 13, App. 131, 146). Navigability below Otter Rock is not an issue in this proceeding nor is it material to determining whether the river is "navigable waters" above that point.

**2. New York Times Article**

The Commission cites (Dec. 8, 13, App. 84, 89), as further evidence of navigability, the account of a canoe trip on

the Housatonic River reported in the New York Times on April 20, 1975. (App. 72). This canoe trip was for pleasure, took place in a 17 foot canoe wholly unsuited for any commercial use and is probative only of the fact that individuals can take pleasure trips on the river in a canoe, subject to certain hazards. It is noteworthy that, in spite of the small, non-commercial nature of the craft, it became hung up on a rock at one point. In addition, the river at another point was reported to be shallow and only a few yards wide, although the trip is said to have taken place in late spring, when the Housatonic River has its highest water levels.

### **3. Benedikt Testimony**

Further alleged "evidence" of navigability (Dec. 8, 19, App. 84, 95) is Frederick Benedikt's testimony regarding a 1974 canoe trip which he read about in the Danbury News-Times. (Tr. 593, App. 702). Mr. Benedikt is a representative of one of the intervenors in the proceeding before the Commission.

Even if this hearsay testimony were entitled to any weight, it again would indicate only that the Housatonic River can be travelled in a pleasure canoe. It shows absolutely nothing with respect to the suitability of the river for commerce. It does show that local newspapers consider canoe trips on the river unusual enough to warrant a story.

### **4. Lyle Thorpe Testimony**

The Commission (Dec. 7-8, 19, App. 83-84, 95) also relied on trips made on the river by witness Lyle Thorpe as evidence of navigability. Mr. Thorpe testified that his trips were in specially designed boats used to stock trout for the Connecticut State Board of Fisheries and Game. (Tr. 354, App. 539). There is no evidence of the size of these boats, their suitability for commercial use or any fact on which to base an inference of navigability. Quite clearly, Mr. Thorpe was not using the river as a highway of commerce. Furthermore, Mr. Thorpe testified that the river was *not* amenable to significant boating or logging operations. (Tr. 115, App. 423).



## 5. Fellows Account

The report of a seven-day trip down the river by Henry Parker Fellows, who recorded his adventures in a work entitled *Boating Trips on New England Rivers*, published in 1884, is also relied on as evidence of navigability but is irrelevant. (Exh. 21, App. 210; Dec. p. 8-9, 19, App. 84-85, 95). The vessel used was a row boat small enough for two people to carry on land around obstructions. (See Exh. 21, p. 10, App. 219). Fellows and his companion took nothing with them except provisions needed for the journey, such as canned goods. (App. 235). Among obstacles encountered were tree trunks (App. 232); fishing weirs (App. 237); boulders (App. 226, *et seq.*); rapids (App. 234, *et seq.*); and mill dams (App. 227, *et seq.*). Even though his flat-bottomed boat was basically empty, the author expressed a wish that the river were one foot higher. (App. 237). At a point above the Derby Dam, one of the points farthest down-river, the boat became stuck two or three times. (App. 243). Navigation was so difficult and hazardous that the row boat even capsized. (App. 235).

Perhaps the most significant aspect of this tale is that it does not mention a single observation of commercial use of the river.

It is also noteworthy that the only navigational directions available to Fellows were those provided by a friend, who had been forced to abandon a similar adventure a few years earlier because his boat was wrecked at Lovers Leap, Mile 38-40. (App. 241-42). This fact suggests very infrequent use of the Housatonic River, even for pleasure.

The Commission's surmise that some of Fellows' difficulties may have been due to a poorly caulked boat is wholly without support. The capsizings experienced by Fellows occurred when the boat hit rocks, the obvious cause of the problems. (App. 235-36).

The sighting by Fellows of a small paddlewheel steamer, not much larger than a rowboat, is also mentioned in the Decision, as if significant. (Dec. p. 10, App. 86). Not only was this boat very small and probably not suitable for com-

mercial use, but it is clear from Fellows' tale that it operated only in the placid shallows near the Town of New Milford. There is no evidence that this craft used the river as a highway of commerce.

The Fellows adventure is undoubtedly evidence that a two-man row boat could, with many difficulties, get down the Housatonic River and that the river may, therefore, be a recreational resource for the adventurous. However, in view of the small size of the craft, the number of obstacles encountered and the length of time to complete the journey, his experience has no evidential value for showing that the river is susceptible to use in interstate or foreign commerce.

#### **6. Pre-1776 Evidence**

The remaining evidence relied on by the Commission to support its finding that boating on the river establishes its navigability relates to events supposedly occurring prior to the Revolutionary War. The fragments of evidence of pre-1776 activities are:

1. A report that in 1644 one Goodyear "paddled or poled" for 30 miles above Derby and built a post on "Goodyear's Island", below New Milford (Dec., p. 9, App. 85; Exh. 26, p. 3, App. 274);
2. A deed of an island indicating "Goodyear had a trading house" there (Dec., p. 10, App. 86; Appendix B to Exh. 19, p. 7, App. 164);
3. Reports that this post was used for trade with Indians (Dec., p. 9, App. 85; Appendix B to Exh. 19, pp. 5-8, App. 162-165);
4. A report that in 1673, "15 families complete with children and worldly goods, passed Paugasset with rafts and canoes" (Dec., p. 10, App. 86; Exh. 26, p. 5, App. 276);
5. A 1680 questionnaire answered by the Governor of the Colony of Connecticut (Dec., p. 14, App. 90; Exh. 30, pp. 4, 7, App. 292, 295);
6. A writer's statement that around 1735 Indians "used the river as a highway to the shores of the Sound" (Dec., p. 10, App. 86; Appendix A to Exh. 19, p. 1, App. 153);
7. A report of annual Indian migrations from Sher-

man and Kent down-river to New Milford for fishing (Dec., p. 10, App. 86; Exh. 26, p. 6, App. 277);

- S. A report that about 1738 two honeymooners "rowed and poled up the river with their belongings" (Dec., p. 10, App. 86; Appendix D to Exh. 19, p. 1, App. 193).

These items have no value as evidence of navigability for several reasons. First, some of the sources from which they are drawn are open to considerable doubt as historically accurate accounts. *The Housatonic, Puritan River*, by Chard Powers Smith, published in 1946 (Exh. 26; App. 272), is a work without attribution of any kind, written over 200 years after the purported events therein recorded. Smith's book is the source of the stories of Goodyear's pole up the river in 1644, the 15 families travelling north in 1673 and annual Indian fishing. The document recording the adventure of the two honeymooners was prepared by various citizens of New Milford, apparently without any citation to primary sources, about 170 years after the supposed event.

The caution with which a court should approach such "evidence" is indicated in *Oklahoma v. Texas*, 258 U.S. 574, 586-87 (1922), where the Supreme Court warned that statements originating at a time when no reliable data existed and later repeated without much concern for accuracy must yield to the actual facts. See also Justice Story's comment in *Morris v. Lessee*, 32 U.S. 554, 558 (7 Pet. 1833), that proof of historical facts through historical works should be confined to consideration of historical works of known character and accuracy where a proper foundation has been laid to insure public confidence.

Second, even giving complete credence to such sources, these items do not show use or susceptibility to use in interstate or foreign commerce. The fact that certain persons (Goodyear, the 15 families and the honeymooners) voyaged up the Housatonic River once in boats of unknown size proves only that it was physically possible to do so. There is not a hint of any commercial use of the river in these



trips. In the absence of evidence as to the type of boat, length of time to make the trip, the number of portages or accidents and similar details, it is utter speculation to use reports of three trips in a period of 94 years, all prior to the founding of the United States, to show a susceptibility for interstate commerce. The fact that Indians used the river to fish has no evidential value on the question of navigability under the Act. To say otherwise would be to make every brook and pond navigable waters of the United States. See, *The Montello*, *supra*; *Leovy v. United States*, *supra*.

The 1680 questionnaire answered by the Governor of the Colony of Connecticut makes not a single mention of the Housatonic River, much less commerce on the river. To say that this item is entitled to weight is clearly error.

The mere existence of Goodyear's trading post on an island in the river, a fact which occupies a prominent place in the Commission's Decision (Dec. 9, 10, 22, App. 85, 86, 98), does not establish that traders used the river as a highway of commerce. It is more plausible that the island was chosen as the site for the post as a security measure (see Appendix B to Exh. 19, p. 18, App. 175), and that the river was traversed only from its banks to the island, than that the island was on a line of commercial boating. It is clear that the post was abandoned by 1671 (Appendix B to Exh. 19, p. 7, App. 164), and probably prior to 1658. (Appendix B to Exh. 19, p. 20, App. 177). Since navigability depends upon trade among the states, *Gibbons v. Ogden*, 22 U.S. 1, 8 (9 Wheat. 1824), this fragmentary evidence of the simplest sort of trade, apparently carried on at an island in the river 100 years before the creation of states, cannot serve as a basis for a finding of navigability for interstate commerce.

A final point of great significance, which was ignored by the Commission, comes from the principal source of information on Goodyear's trading post, a paper prepared by Rev. William G. Andrews, D.D. in 1886 (Appendix B to Exh. 19, pp. 9-21, App. 166-78). The Rev. Andrews explained that:

Boats large enough to be of much value in the fur-trade would have had to stop below the rapids, which extend for some distance south of the falls [i.e., at Goodyear's Island]. That larger craft than canoes and skiffs might have ascended as far as this, *though they could not do so now*, is made probable by a statement of Dr. Dwight. . . . [Emphasis added.]

*Id.* at p. 18.

In other words, historical surmise two centuries after the fact suggests that the Housatonic River *might* have accommodated something bigger than a canoe in the 1640's. However, by the 1880's it could not do so, according to an eyewitness.

The only piece of data from the pre-Revolutionary War period that might possibly have some relevance is the statement that the Indians "used the river as a highway to the shores of the Sound." (Appendix A to Exh. 19, p. 1, App. 153). This 1968 statement comes from one Elwood R. Maunder, writing in a magazine identified as Connecticut Woodlands. The basis for the statement, 300 years after such activities were supposed to have taken place, and Mr. Maunder's qualifications as a historian, are not in evidence. The frequency of the use, whether once or often, the period of time, the types of boats, the parts of the river so used, are all important missing details. The absence of even one claimed use of the Housatonic River for commercial transportation of people in the 200 years of this Nation's existence vitiates any reliance on this account for the purposes of this proceeding.

The final reason why these fragmentary pieces of history, legend or folklore, as the case may be, are valueless as substantial evidence of navigability is that they show, at most, a possibility of the Housatonic River's suitability for what might possibly have been considered commerce before the founding of this Nation. The basis for the definition of navigability in Section 3(8) of the Act is the grant of power to Congress in Article I of the Constitution to regulate commerce "among the several States." *Gibbons v. Ogden*, *supra* at 8. The pre-Revolutionary activities relied on by

the Commission fail to establish susceptibility of the river for commerce today or *at any time* since the formation of the Nation.

The area around the Housatonic River was settled by English colonists well before the Revolutionary War. Voluminous historical records have been kept since the early 17th century. Yet the eight bits of "evidence" cited in the Commission's Decision are virtually the sole reports found by the parties to the Commission's proceeding that show any activities on the river during a period of nearly 150 years before the Revolutionary War.

The sum and substance of the evidence of boating activities on the Housatonic River, relied on by the Commission to establish navigability, amount to: (a) six indisputably pleasure voyages, in rowboats and canoes, (New York Times article, Benedikt testimony, Thorpe, Fellows, Fellows' friend and the honeymooners); (b) two non-commercial expeditions by early settlers in 1644 and 1673 (Goodyear and the fifteen families); and (c) accounts, written more than 100 years after the fact, of use by Indians.

To hold that this scanty evidence, which spans more than three centuries and yet includes *not one* primary account of a commercial use of the Housatonic River, is substantial enough to support a finding of navigability would be to say that every small stream in which a canoe can be made to float in spring is navigable waters of the United States, contrary to the teachings of *The Montello, supra*; *Leovy v. United States, supra*; and *United States v. Rio Grande Dam & Irrigation Co., supra*. The evidence cited by the Commission does not demonstrate that the Housatonic River is, or ever has been, "generally and commonly useful to some purpose of trade or agriculture", *The Montello, supra* at 442; or that it has ever been "a continued highway over which commerce is or may be carried on . . . ." *The Daniel Ball, supra* at 563. There is no evidence of use by large boats actually seen by witnesses, such as in *United States v. Appalachian Electric Power Co., supra*.



**C. Unrebutted Evidence Establishes That The Housatonic River Has Not Been Used For Navigation By Boat In Interstate Or Foreign Commerce And That It Is Not Suitable For Such Use.**

CL&P presented unrebutted evidence, largely ignored in the Commission's Decision, which establishes that the Housatonic River is not "navigable waters" at the projects under consideration.

Of critical importance in determining whether the Housatonic River is navigable are its undisputed physical characteristics upstream of Otter Rock. See, *United States v. Appalachian Electric Power Co.*, *supra* at 407; *Rochester Gas & Electric Corp. v. F.P.C.*, 344 F.2d 594, 598-99 (2d Cir.), *cert. denied*, 382 U.S. 832 (1965). The Housatonic River falls 645 feet in its 83.8 miles in Connecticut, including gradients of up to 330 feet/mile. Between the upper reaches of the Bulls Bridge Reservoir (Mile 58) and the Stevenson powerhouse (Mile 19.3), the gradient is approximately 8.0 feet/mile. (Tr. 114, App. 422; Exh. H, App. 351). This gradient contrasts sharply with the gradients of 1.53 to 2.35 feet/mile found suitable for logging in *Wisconsin Public Service Corp. v. F.P.C.*, *supra*.

The Housatonic River in its natural condition in Connecticut also includes numerous rapids, waterfalls, shallows and boulders, rendering any significant amount of commerce or regular travel impossible. (Tr. 114-15, App. 422-23; Exh. 21, App. 210). These obstructions are the primary characteristics of the river channel, not scattered exceptions or interruptions in an otherwise navigable waterway, as defined in Section 3(8) of the Act. Furthermore, the natural flow of the Housatonic River, ranging from spring floods or freshets to very reduced flows during low water periods, is both too irregular and inadequate to support navigation. (Tr. 100-02, 115, App. 410-12, 423).

Indicative of the treacherous, non-navigable nature of the Housatonic River is the conclusion of the Commission, amply supported by the record, that the river is not amenable to improvements at reasonable cost sufficient to permit navigation. (Dec., p. 23, App. 99; Tr. 133, 135-36,

695, App. 441; 443-44, 804; Exh. 25, 39, App. 268, 319). Compare *United States v. Appalachian Electric Power Co.*, *supra*.

The Decision lightly dismisses numerous government reports which indicate that the Housatonic River is not navigable upstream of Otter Rock, on the sole ground that navigability was not defined in those reports. (Dec., p. 17, App. 93). However, such documentary evidence has often been used both to establish and to refute claims of navigability, even absent express definitions of the term. For instance, *Georgia Power Co. v. F.P.C.*, 152 F.2d 908, 911 (5th Cir. 1946), relied heavily upon various reports of the Army Corps of Engineers, "navigation experts", in determining the issue of navigability. See, *Oklahoma v. Texas*, *supra* at 577-78 (Red River non-navigable); *United States v. Appalachian Electric Power Co.*, *supra* at 418 (New River navigable).

As the record shows, the Army Chief of Engineers has concluded that the Housatonic River was and is not now navigable upstream of Otter Rock. (Items by Reference B, C and I, App. 339, 343, 361). Furthermore, his studies and reports do not recommend improvements to allow navigation. The "308 Report", prepared by the Army Chief of Engineers, states that:

Navigation above Shelton is limited to craft of less than 3-foot draft which may pass the Shelton [Derby] Dam by means of a canal and locks and proceed as far as Otter Rock, *which was and is the head of navigation*, some 3 miles above the dam and 16.5 miles from the mouth. [Emphasis added.]

(Item by Reference B, at 22, App. 341).

Corroborating the conclusion of these reports is the Department of the Army's "List of Bridges Over The Navigable Waters of the United States," at 194-95 (1948 ed., revised to July 1, 1941) (Item by Reference D, App. 346). That list shows five bridges over the Housatonic River. The bridge farthest upstream listed as crossing navigable waters is at Mile 13.8, more than 5 miles downstream of the Stevenson Project, the most southerly of the four proj-

ects under consideration in this proceeding. Even though numerous highway and railroad bridges cross the Housatonic River upstream of Otter Rock, none is listed in this document, obviously because the Army had determined that they did not cross navigable waters.

In addition, no attempt was ever made to enforce the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §401, *et seq.*, 30 Stat. 1151, with respect to these projects. Section 15 of that statute prohibited construction on navigable waters of the United States absent federal approvals. Section 17 gave the Attorney General of the United States the duty to enforce this requirement.

Lyle Thorpe, who through his work with the Connecticut State Board of Fisheries and Wildlife was more familiar with the Housatonic River than any other witness, testified that upstream of Otter Rock there was insufficient water most of the year to support boating even by canoes. (Tr. 115, App. 423). His testimony was unchallenged by any other witness.

Evidence of non-navigability was also presented by Professor Christopher Collier, a trained historian, whose specialty includes Connecticut history. (Tr. 129, App. 437). Professor Collier testified at length as to statements in historical sources and gave his expert opinion, as a professional historian, that the river is not and never has been used for commercial navigation. Professor Collier stated that:

I can assert with a high degree of certainty that the River, of great importance as a power source, was insignificant for transportation north of Derby. I dare say that *no one* in eighteenth or nineteenth-century Connecticut was making a living from the navigation of the Housatonic River north of Derby, *nor is there any evidence that anyone was dependent on the River for transportation.*

Although there exists some evidence that *during the spring freshets* boats of some sort could proceed from New Milford, Connecticut, to Derby, it is far from certain that these boats carried either passengers or cargo. [Emphasis added.]

(Tr. 132, App. 440).



The Commission's Decision attempts to dismiss Professor Collier's testimony (Dec., pp. 16-17, App. 92-93) on the ground that "navigability" is not defined in his source material. Professor Collier simply explained that old geographers used the word differently from courts because the courts have expanded the definition of "navigable waters" to include those used for commercial logging operations, a legal interpretation not accepted by the Commission until 1943. *City of Spooner, Wisconsin*, 3 F.P.C. 986 (1943). However, his sources, as well as those of the Commission's Staff and the intervenors, establish that commercial boating has never occurred on the Housatonic River.

The Commission's total disregard of Professor Collier's testimony, which was based on an exhaustive review of authentic and reliable historical documents (Exh. 11, App. 134; Exh. 20, App. 196), is inconsistent both with its own reliance on such documents (Dec. 5, 19, App. 81, 95) and with the Supreme Court's use of similar evidence. *See, The Montello, supra* at 441-43; *United States v. Appalachian Electric Power Co., supra* at 411-19.

The non-navigability of the Housatonic River is shown by the fact that Professor Collier's exhaustive research, as well as that conducted by the Commission's Staff and the intervenors below, in public and private records spanning over 300 years, uncovered only the few, scattered accounts of insignificant, non-commercial small boat trips discussed above.

**D. The Record Does Not Contain Substantial Evidence Of Commercial Logging Operations On The Housatonic River.**

As an alternative basis for its finding of navigability, the Commission has cited evidence claimed to show commercial logging on the Housatonic River in the past. This evidence can no more support Commission jurisdiction based on navigability than could the scattered reports of boating.

**1. Dewey Account**

The major item of evidence relied upon by the Commission (Dec., pp. 12, 20, App. 88, 96) as proof of the river's

use for commercial logging is a short passage written by Reverend Chester Dewey in a work entitled *History of the County of Berkshire*, published in 1829. (Exh. 22, App. 248).

This work does not constitute substantial evidence of navigability. First of all, Dewey's account is admittedly hearsay (Dec., p. 20, App. 96) and must therefore be scrutinized carefully. In addition, his statement is more consistent with CL&P's position that natural forces caused the logs to float downstream than with the Commission's view that commercial loggers were at work. The Commission's Decision makes much of Dewey's assumed knowledge of proper grammar. Indulging this assumption, one must then ask why Dewey used the passive tense to describe the supposed logging operations. His statement was that logs "have been thrown into the river and floated down its current", (App. 256-57) not that loggers "had thrown" them in.

CL&P's interpretation of Dewey's statement is corroborated by Samuel Orcutt's first-hand account of the effect of flood waters in his *History of Derby*, published in 1880. Orcutt wrote that:

The water and ice floods in the Housatonic and Naugatuck rivers in the long past, according to tradition, were more magnificent and terrible than in later years. Large quantities of cordwood upon the shores, saw-mill logs, ship timbers, huge trees broken or torn up by the roots, houses, barns and bridges were swept down stream almost annually by resistless floods. [Emphasis added.]

(Tr. 148; App. 456).

Dewey's detailed description of the origins of the Housatonic River in various ponds and marshes (Exh. 22, App. 251-52), of valuable mill sites and water privileges (*Id.*, App. 252-55) and of the trade carried on in the region (Tr. 148, App. 456) make a startling contrast to his one ambiguous statement regarding the floating of logs. Why Dewey would take the trouble to list every important riverside factory or mill site in Pittsfield, Lenox, Lee, Stockbridge, and Great Barrington and yet fail to name a single logging site or make even one explicit reference to a commercial

logging operation can be explained only by the fact that no commercial logging was done on the river.

When one contrasts this single ambiguous piece of information with the evidence found to support a holding of navigability in *Wisconsin Public Service Corp. v. F.P.C.*, *supra* (3,000 employees working in a logging industry grossing \$4,000,000 in one year) or *State of Wisconsin v. F.P.C.*, *supra* (logging teams of up to 100 men working annually from 1876 to 1924), it becomes clear that the Commission's finding of navigability of the Housatonic River on the basis of alleged logging operations is not supported by substantial evidence.

One other statement of interest in Mr. Dewey's *History* is that the river is "not large and deep enough for boat navigation . . ." (App. 255).

## **2. Frank Stowe**

The Commission found its interpretation of Dewey's account of logging "to some extent corroborated by, Frank Stowe's recollection . . ." of life near the Housatonic River. (Dec., p. 20, App. 96). This "recollection" is contained in a document identified as a newspaper article, perhaps published in the New Haven Register, perhaps in 1951 or 1952, purporting to be written by one Frank Stowe. Stowe, who claimed in the article to have lived near the Housatonic River for almost 80 years, is otherwise unidentified. This document (Exhibit 33; App. 300) was admitted into evidence over CL&P's objection "with considerable reluctance" by the administrative law judge, who further stated that "the weight I will give it will be affected by the reluctance with which I receive it." (Tr. 738, App. 847). Yet, it has become a cornerstone of the Commission's finding regarding commercial logging.

Even granting the validity of this exhibit, despite the Staff's failure to check records of the supposed publisher (Tr. 737, App. 846), and even giving credence to the information contained in it, this item of evidence cannot support the Commission's finding of navigability based on use of the Housatonic River for commercial logging.



Stowe's only reference to logging on the river was his story of a *unique* experience when, as a middle-aged man, he placed booms across the river and polled drifting logs to a sawmill on the east bank. The very fact that Stowe calls this experience "unduplicated" strongly suggests that commercial logging did not exist on the river.

### **3. Samuel Church**

The Commission also relies on an 1841 speech by one Samuel Church, who mentioned the erection of a paper mill and sawmill "at the great falls of the Housatonic" near New Milford about 1783. (Dec., p. 13, App. 89). Church, whose occupation, experience and reliability are unknown, spoke of pine timber which was "annually drifted down the river from the towns above." (Exh. 37, p. 5, App. 316). This hearsay comment regarding drifting logs, an event that occurred in a town almost 40 miles from Church's home, over 60 years earlier, and before the speaker's birth (Exh. 37, p. 3, App. 314), cannot be considered substantial evidence of commercial logging activity.

### **4. Shipbuilding At Derby**

Although the Commission refers to "shipbuilding some of which was done at Derby" as further evidence of commercial logging (Dec., p. 12, App. 88; Exh. 28, p. 2, App. 283), there is absolutely no evidence showing that lumber used in such shipbuilding was floated down the Housatonic River, rather than being transported in another manner. The speculative comments in the Decision (App. 89), regarding the risks of masting and the knowledge of masting crews, are based on the prepared testimony of the witness Joseph Hickey, who in turn based his statements on a book not in evidence. However, it is clear from Mr. Hickey's testimony that the book, *Pine Trees & Politics*, by Joseph J. Malone, did not deal in any way with the Housatonic River but rather dealt with certain New Hampshire rivers. (Tr. 624-26, App. 733-35). Therefore, this material offers no support to the finding of navigability.

### **5. Mast Swamp**

As another prop for its finding of navigability based on

commercial logging operations, the Commission cites the existence of a place near New Milford known as "Mast Swamp". (Dec., p. 22; App. 98). The Commission notes that the name is "certainly inconclusive by itself" (*Id.*), yet still includes it as evidence supporting its finding.

The Court rejected such a procedure in *Rochester Gas & Electric Corp. v. F.P.C.*, *supra*, in which the Commission had attempted to draw inferences regarding navigability from a place name. "Portage", the name of a river town, was claimed to be evidence that the river at that point must have been used for transporting goods. The Commission justified its inference because of its alleged powers of perception and deduction. The Court quickly dispensed with these inferences by stating that they were not supported by substantial evidence. Instead, the Court held that "actual use" of a river must be shown, particularly when the river runs into acknowledged avenues of interstate commerce, as in this proceeding.

The Commission also places reliance on the statement, made without any citation of authority, in a 1926 work by Rev. Edward C. Starr, that "the so early name of Mast Swamp proves that logging on the river long preceded settlements near it." (Exh. 27, p. 3, App. 280; Dec., p. 13, App. 89). The only trained historian to testify in the proceedings below, Professor Collier, "found Mr. Starr to be too inaccurate a source upon which to rely." (Tr. 149, App. 457). In any case, Starr's inference and the Commission's reliance on it are no more permissible than the Commission's own improper inference based solely on a name. *Rochester Gas & Electric Corp. v. F.P.C.*, *supra*.

What remains then of "Mast Swamp" as evidence of commercial logging is a handwritten statement by one Silas G. Patterson, written in 1905, that ship masts were cut and floated down the river. (Exh. 42A, p. 6, App. 331; Dec., p. 13, App. 89). No one contends that this statement is based on first-hand knowledge. In fact, there is no indication of the source of his statement. (See Order, dated March 11, 1975, App. 68). This one hearsay account of com-

mercial logging on the river at Mast Swamp, in almost 300 years, can hardly be called substantial evidence.

#### **6. Weromaug Deed and Old Public Acts**

The final items of evidence regarding logging cited in the Commission's Decision are a 1716 deed by the Indian Chief Weromaug (Exh. 42A, pp. 4-5, App. 329-30), a 1795 act of the Connecticut legislature (Exh. 25, p. 4, App. 271) and an 1807 act of the Connecticut legislature (Exh. 38, p. 2, App. 318).

As proof of navigability, these documents have no value. Although each refers to the possibility that logging might occur on the Housatonic River, they definitely do not record any existing logging, nor indeed do they even suggest an unused suitability of the Housatonic River for logging.

The Weromaug deed, which involved the Mast Swamp area, did nothing more than give to the grantee the "use and benefit of the said Great River to pass and repass in at any time and at all times with Rafts trees Loogs or What Else so ever . . . ." Such a grant of an easement is no proof that the rights granted were or could ever be exercised.

The 1795 act, authorizing construction of locks on the Housatonic River near Newtown, contained the following proviso: "that nothing in this Act be construed in the least Degree to affect the rafting of Timber and Lumber down the present Bed or Channel of said River and the Fishery thereof." This act is no more proof of logging than it is proof of the existence of the locks authorized by it. The locks were, of course, never built.

The 1807 act provided that so much of an act:

... regulating the floating of logs and other timber, shingles and staves down Connecticut River, be, and the same is hereby declared to extend to the floating of logs, lumber shingles and staves down the Ousatannick river.

Like the 1795 act, this is not any kind of evidence, not to mention substantial evidence, of logging on the river. When these items are compared to the substantial commercial logging operations found in *State of Wisconsin v. F.P.C.*,



*supra*, and *Wisconsin Public Service Corp. v. F.P.C.*, *supra*, their inability to support the Commission's finding of navigability is clear.

**E. Unrebutted Evidence Establishes That The Housatonic River Has Never Been Used For Commercial Logging Operations.**

CL&P, through witnesses Professor Collier and Lyle Thorpe, presented extensive evidence establishing that the Housatonic River was never used for commercial logging or for the floatation of timbers to be used for ship masts. (Tr. 116, 138-39, 147-48, App. 424, 446-47, 455-56). Professor Collier's extensive examination of sawmill account books covering various periods from 1722 to 1862 revealed no entry related to the commercial floatation of logs down the Housatonic River (Tr. 140, 389-93, App. 448, 574-78). These records encompassed the entire period during which, in his expert opinion, logging activity would have occurred on the Housatonic River and been recorded, if ever. The fact that he did not examine such books for later periods of time does not permit an inference that such an examination would have revealed entries evidencing commercial logging on the river. (*Cf.* Dec., p. 21, App. 97). Based upon this and other research, Professor Collier gave his expert opinion that the only notable accounts of logs floating down the river were reports of isolated and accidental occurrences. (Tr. 138-39, 147-49, App. 446-47, 455-57).

Professor Collier's review of all Berkshire County and Litchfield County newspapers from 1790 to 1831 likewise failed to reveal any mention of logging on the Housatonic River, although indirect references to overland transportation of timber did appear. (Tr. 139-41, 388, App. 447-49, 573). With respect to this fact, the Commission's Decision said:

It cannot be denied that the absence of newspaper reportage would ordinarily be significant, since it seems reasonable to assume that log floatations would have excited newspaper comment and reports, and, if

there had been commercial boating, one would expect that there would have been, at least, advertisement ... (Dec., p. 21, App. 97).

Nevertheless, the Commission dismissed this absence of evidence and refused to accept the logical conclusion — that significant logging on the Housatonic River had not occurred.

Mr. Thorpe, the only witness who had extensive personal knowledge of the Housatonic River and the witness most familiar with the physical characteristics of the river, also concluded that it was highly unlikely that the river was ever used for logging operations or for transporting people or local goods to any significant extent. (Tr. 115, App. 423). Mr. Thorpe noted that the river gradient was steep and the water flow rapid. (*Id.*). If logs were ever washed over the Great Falls at New Milford, it was "inconceivable" that the timber would not be broken into little pieces. (Tr. 139, App. 447). In contrast to these facts, the typical 1.53 to 2.25 feet/mile gradients of the Wisconsin River found suitable for logging in *Wisconsin Public Service Corp. v. F.P.C.*, *supra*, are particularly noteworthy.

In addition, in spite of his familiarity with all areas of the Housatonic River, Thorpe failed to find any physical evidence along the river of artifacts normally found in locations where logging drives have occurred. (Tr. 346-56, App. 531-41).

The paucity of positive evidence supporting a claim of commercial logging, particularly in light of the substantial evidence indicating the absence of commercial logging on the Housatonic River, cannot support a finding of navigability under the Act. The isolated, accidental occurrences of logs floating upon the Housatonic River are far from the substantial evidence of significant logging operations required to establish navigability. *Montana Power Co. v. F.P.C.*, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951); *Wisconsin Public Service Corp. v. F.P.C.*, *supra*; *State of Wisconsin v. F.P.C.*, *supra*. The use of the Housatonic River for logging, if any, would compare only to that evidence in *United States v. Rio Grande Dam &*

*Irrigation Co.*, *supra* at 698, regarding which the Supreme Court said, the "mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river."

Not only does the record contain no substantial evidence of commercial logging, not to mention such logging "in the course of a continuous movement from one state to another," *Wisconsin Public Service Corp. v. F.P.C.*, *supra* at 747, but rather, substantial evidence shows without question that no significant logging ever took place on the Housatonic River.

### CONCLUSION

For the foregoing reasons, the Court should find that the Commission lacks jurisdiction to license CL&P's four hydroelectric projects under consideration because none of them affects the interests of interstate or foreign commerce and none of them is in "navigable waters of the United States."

Therefore, the Court should set aside the order of the Commission and remand this proceeding to the Commission with directions to issue an order finding that Commission jurisdiction is lacking.

Respectfully submitted,

*Petitioner*

THE CONNECTICUT LIGHT AND  
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FEDERAL POWER ACT, 16 U.S.C. Section 791a, *et seq.*,  
49 Stat. 863:

\* \* \* \*

Section 3:

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

\* \* \* \*

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of person or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

\* \* \* \*

Section 23(b):

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate com-

merce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

\* \* \* \*

Section 201 :

\* \* \* \*

(b) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydro-electric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

\* \* \* \*

Section 313:

\* \* \* \*

(b) The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

\* \* \* \*

THE RIVERS AND HARBORS APPROPRIATION  
ACT OF 1899, 33 U.S.C. Section 401, *et seq.*, 30 Stat. 1151:

\* \* \* \*

Section 9:

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

\* \* \* \*